ATTACHMENT C

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms,
Conditions and Rates for Unbundled
Network Elements and Interconnection
(PUC 20) and Resold Services (PUC 21)

September 3, 2004

ORDER – PART II

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct). In addition, Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. "Total Element Long Run Incremental Cost (TELRIC)" for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. We also find that we are not preempted from considering in this proceeding whether Verizon must continue to offer line sharing pursuant 35-A M.R.S.A. §§ 1306 and 7101.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms (SGAT) would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission (Dinan Letter),

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[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial case conference for December 10th. On December 4, 2002, prior to the case conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December 2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case

[2] The parties at that time included: the Office of the Public Advocate (OPA), Association of Communications Enterprises (ASCENT), MCI/WorldCom (MCI), Mid-Maine Telecommunications (Mid-Maine), and Oxford Networks (Oxford). Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

[3] At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Biddeford Internet Corporations d/b/a Great Works Internet (GWI), Conversent Communications (Conversent), and Cornerstone Communications (Cornerstone) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4] Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing UNEs under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial Briefs were filed by Verizon, the CLEC Coalition, and the Consolidated Intervenors (GWI, OPA and Cornerstone). The same parties filed Reply Briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II*,[5] the appeal of the *TRO*. Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon.

On July 23, 2004, the Hearing Examiner issued her Report recommending that we find that that Verizon must include all of its wholesale offerings, including UNEs

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[5]*U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

provided pursuant to section 271, in its state wholesale tariff. The Examiner also recommended that we find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, the Examiner recommended that we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs. In addition to serving her Report on the parties to this proceeding, the Examiner also served the Report on the parties to Docket No. 2004-135, Verizon's Request for Arbitration, pursuant to our June 11, 2004 decision in that case to consolidate the Arbitration proceeding with this Wholesale Tariff proceeding. All parties to both cases were given an opportunity to file exceptions.

On August 6, 2004, Verizon, Conversent, Cornerstone, the Association for Local Telecommunications Services (ALTS), Covad Communications (Covad), the CLEC Coalition, United Systems Access Telecom, Inc. (USA Telephone), AT&T Communications of New England, Inc. (AT&T), and GWI filed Exceptions to the Examiner's Report. The arguments from all parties in the three rounds of briefs and exceptions are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I*[6] decision was released, the FCC issued its *TRO,* and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most respects[7]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

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[6]*United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA I).*

[7]In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

1. Difference Between Section 251 and 271 UNEs

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[8] Thus, Checklist Item No. 2 requires an ILEC to meet all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[9]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271.[10] However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.[11]

2. State Commission Authority in 271 Enforcement Matters

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[8]In the *TRO,* the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[9]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[10]*TRO* at ¶ 653.

[11]*TRO* at ¶ 656.

In the FCC's Order granting Verizon 271 authority in Maine,[12] the FCC stated:

> Working in concert with the Maine Commission, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[13]

The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order,* for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[14]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order,* [15] which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the *New York 271 Order* specifically endorsed state commission authority to enforce commitments made by Verizon (then Bell Atlantic) to the New York Public Service Commission. The FCC stated that:

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[12] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (*Maine 271 Order*).

[13] *Maine 271 Order* at ¶ 65.

[14] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order).*

[15] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order).*

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission rather than the FCC.*[16]

(emphasis added). Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[17]

3. Verizon's 271 Commitments to the Commission

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[18]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

> The MPUC finds, based upon the record before us, including the commitments made by Verizon in its March 4, 2002 letter

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[16] *New York 271 Order* at ¶ 452.

[17] *New York 271 Order* at n. 1353.

[18] Commission's 271 Letter.

> to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[19]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our 271 Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[20]

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon

[19] Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[20] 271 Report to FCC at p. 7.

admitted that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argued that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC may set rates for these UNEs. Verizon maintained that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as the TELRIC standard used for section 251 UNEs.

In its reply brief, Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the PAP and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon did not specifically address state authority under section 271 in its Supplemental Brief, Verizon stated that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

In its Exceptions, Verizon argued that, even if the FCC orders cited by the Examiner contained a delegation of section 271 enforcement authority to state commissions, after *USTA II* any such delegation would be illegal. Verizon claimed that Congress had expressly limited the states' role in section 271 matters to consultation with the FCC during its review of a 271 application and that any "cooperative enforcement" envisioned by the FCC was limited to a monitoring role.

Verizon also argued that requiring it to file a wholesale tariff at the Commission violated federal law. Specifically, Verizon argued that two federal appellate decisions, *Wisconsin Bell, Inc. v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003) and *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), had found that state commissions could not require an ILEC to tariff its TelAct unbundling and interconnection obligations with the state commissions. Verizon contended that the rationale motivating our desire for a state wholesale tariff, namely concerns with difficulties and delays associated with individual negotiations, had been struck down by both courts. Thus, according to Verizon, the two federal decisions "are cause for serious reservation" regarding whether the Commission should "continue to expend resources on state wholesale tariffing inquiries."

2. Consolidated Intervenors

In their initial brief, the Consolidated Intervenors stated that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cited paragraphs 653 and 655 of the *TRO*. They also pointed to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They pointed to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review, as evidence of the Commission's authority. They asserted that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpreted the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

The Consolidated Intervenors filed separate Exceptions, however, all three parties (GWI, OPA, and Cornerstone) concurred with the Examiner's analysis of the differing section 251 and section 271 unbundling obligations and her recommendation that Verizon be required to include its section 271 unbundling obligations in the wholesale tariff.

3. CLEC Coalition

In its brief, the CLEC Coalition stated that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concluded that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271, including setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argued that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine.

In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process. The CLEC Coalition's exceptions generally supported the Examiner's Report and included specific comments on issues addressed in other sections of this order.

4. Other CLECs

ALTS, Covad, USA Telephone, AT&T, and Conversent, though they did not participate in the briefing phase of this proceeding, filed exceptions to the Report. ALTS and Covad filed joint exceptions which concurred with the Examiner's

conclusion that we have authority to "ensure Verizon's ongoing compliance with the competitive checklist of section 271" and that we can, and should, require Verizon to file a wholesale tariff including all of its unbundling obligations. ALTS and Covad dismissed Verizon's arguments regarding exclusive FCC jurisdiction as contrary to the existing and continued authority of state commissions to enforce PAPs. USA Telephone's exceptions focused on pricing issues, though they did appear to support the recommendations regarding Commission authority to require a wholesale tariff.

Conversent's exceptions supported the Examiner's conclusion that Verizon should include all of its wholesale offerings, including section 271 UNEs, in its Maine wholesale tariff. Conversent claimed that such a requirement will reduce the risk that Verizon will unilaterally cease providing high-capacity DS1 and DS3 loops and dark fiber. Conversent countered Verizon's arguments concerning the voluntary nature of its PAP commitments and pointed out that if those commitments were entirely voluntary, Verizon could stop making payments at any time – a result not contemplated by the FCC, state commissions or CLECs. Conversent urged us to enforce the 271 conditions and commitments made by Verizon and to specifically require Verizon to include DS1 and DS3 high-capacity loops in its wholesale tariff. Conversent argued that neither the *USTA II* decision nor the Court's mandate eliminated the 251 unbundling requirement for high capacity DS1 and DS3 loops – the decisions only vacated the sub-delegation to the states and not the national finding of impairment. Conversent argued that we are not preempted from requiring Verizon to include those UNEs in the state wholesale tariff because such a requirement does not substantially prevent the implementation of section 251 or the purposes of the Act.

AT&T concurred with the Examiner's recommendations concerning our jurisdiction over 271 unbundling requirements and the need for Verizon to include all of its unbundling obligations in its wholesale tariff.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and, if that commitment includes Verizon's 271 unbundling obligations under Checklist Items 4, 5, 6, and 10, our authority to enforce such a commitment.

1. Scope of Verizon's commitment

Interpretation of Verizon's commitment to file a wholesale tariff requires an examination of the language of the letters exchanged with Verizon during our 271 proceeding and as well as a review of the underlying purposes of the condition. Neither the Commission's 271 Letter nor the Dinan Letter contain any language that would limit Verizon's commitment to file a wholesale tariff to its 251 obligations. Thus

we must turn to the underlying purposes of the condition for guidance. During our 271 proceeding, we heard numerous complaints from CLECs regarding the difficulties and delays associated with negotiating amendments to interconnection agreements with Verizon. Today, we continue to hear complaints from CLECs regarding difficulties with interconnection agreements. In the Verizon Arbitration proceeding,[21] CLECs complained that Verizon had not responded to requests from CLECs to negotiate amendments to their interconnection agreements.

We find that a reasonable interpretation of the condition we placed upon Verizon during our 271 proceeding, and the condition it committed to fulfill, requires Verizon to include both its section 251 and 271 unbundling obligations in its wholesale tariff filed in Maine. Indeed, the reasons underlying the condition apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may arise in an interconnection agreement negotiation.

2. Our authority to enforce Verizon's commitment

While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon ignores the FCC's directives regarding enforcement of ILEC commitments to state commissions and fails to explain adequately why states have authority over some section 271 issues, such as PAPs, and not others. Verizon also does not address the requirement, pursuant to section 271(c)(2)(A)(ii), that its interconnection agreements, subject to state arbitration pursuant to section 252(b), include access and interconnection that meets the requirements of section 271(c)(2)(B) – the competitive checklist. We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that includes both its section 251 and 271 obligations.

Under section 271, state commissions do not have authority to approve an ILEC's 271 application but are allowed to consult with the FCC concerning an ILEC's 271 application. In fulfilling that role, the FCC encouraged state commissions to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met section 271's standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than

[21] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

> in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
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> . . .
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> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

Thus, the FCC explicitly acknowledged the prominent role the Commission played in evaluation of Verizon's 271 Application and the depth of the Commission's understanding of the particular circumstances of the competitive market in Maine.

As indicated above, the FCC has clearly stated that states may enforce commitments made to them by ILECs during the 271 process. The FCC's statement regarding enforcement of state 271 commitments and our significant experience with the issues associated with the wholesale tariff, provide us with legal authority and substantive expertise to enforce Verizon's wholesale tariff commitment. We will exercise this authority by requiring Verizon to honor the commitment it made to us in the 271 process to file a wholesale tariff which includes all of its unbundling requirements and then evaluating that tariff for compliance with state and federal standards. If a party believes the Commission has not applied the correct standard, the party may file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II*.[22]

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[22]We do not find Verizon's reliance upon the Sixth Circuit's *Verizon North v. Strand* decision and the Seventh Circuit's *Bie v. Worldcom* decision persuasive. In both the *Strand* and *Bie* cases, the issue before the court was whether a state commission could order a complete by-pass of the TelAct interconnection requirements – a matter not at issue in this case. Specifically, we never envisioned that our wholesale tariff would replace the need for an interconnection agreement, only that it would simplify the process by providing a "floor" of standard terms and conditions, which is consistent with Verizon's own practice of offering an interconnection agreement template with standard offerings. Further, we note that section 252 of the TelAct specifically provides that a state commission may consolidate the litigation associated with multiple arbitration

Verizon's express agreement to file a wholesale tariff, in its letter confirming that it would abide by the Commission's conditions for recommending Section 271 approval, provide us with an independent basis for requiring Verizon to file such a tariff now. We assume Verizon did not lightly make its commitment, and that Verizon understood that the Commission, in accepting that commitment, would not condone or allow conduct inconsistent with the obligations thus undertaken. It follows, then, that Verizon by its acceptance of the condition (for which Verizon obtained Commission support for its Section 271 application) granted to the Commission the authority to ensure that Verizon fully complied with the wholesale tariff obligation defined by Section 271. This is not to suggest that the Commission has the independent authority to define the scope of those obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Having determined that Verizon must tariff its 271 obligations, we consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II*.

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, and be nondiscriminatory, and further provides that it may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the Supreme Court[23]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in

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requests. Given that Verizon's pending *Arbitration* proceeding involves over 100 carriers and the same issues associated with the wholesale tariff, we believe that our approach of consolidating the two proceedings and developing a baseline wholesale tariff as a first step in the interconnection agreement process achieves the underlying goal of the TelAct, i.e., encouragement of interconnection between competitors and ILECs.

[23] *See AT&T v. Iowa Utilities Bd.,* 525 U.S. 355 (1999)(*Iowa II*).

accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[24] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[25] The FCC noted that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[26]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[27] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are

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[24] *TRO* at ¶ 656.

[25] *TRO* at ¶ 664.

[26] *Id.*

[27] *USTA II* at 53.

jurisdictionally intrastate.[28] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252 arbitration proceeding.[29] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon

In its briefs, Verizon argued that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contended that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. According to Verizon, the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also pointed out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

In its exceptions, Verizon urged us to clarify that all matters involving prices for section 271 elements are "deferred" to the FCC. Verizon argued that, because of its belief that we have no authority to define UNEs under section 271, we also would have no authority to set prices of any such UNEs. Verizon contested the grounds underlying the Examiner's finding that we have authority to set prices for section 271 UNEs, contending that the Examiner places too much significance on the Massachusetts DTE order cited above and that Verizon's petition for reconsideration of that order is still pending. Verizon also argued that Congress's silence on the issue of state enforcement of 271 obligations does not imply that states do, in fact, have any authority. Finally, Verizon alleged that *USTA II* "flatly rejected" any sub-delegation of FCC powers to state commissions.

Verizon also challenged the Examiner's recommendation that the Commission require Verizon to offer section 271 UNEs at TELRIC prices until Verizon obtained approval from the FCC of its 271 UNE rates. Verizon alleged that the FCC "ruled unequivocally" that TELRIC should not apply to section 271 UNEs and that the Examiner's recommendation was "based on a misunderstanding" of the process the

[28] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

[29] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

FCC intends to use for section 271 UNEs. Finally, Verizon urged the Commission to adopt the FCC's "safe harbor" pricing standards for section 271 UNEs, i.e. special access rates or commercially agreed upon prices.

2. CLECs

In its briefs, the CLEC Coalition argued that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs which the Commission could review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[30]

In their exceptions, a number of CLECs challenged the Examiner's analysis and recommendation that we refrain from exercising any section 271 pricing authority that we might have. The CLEC Coalition argued that the FCC's statements in paragraph 664 of the *TRO* should be viewed as a "limited statement" regarding the FCC's assertion of jurisdiction over section 271 pricing and that we should, in fact, exercise our 271 pricing authority. Specifically, the CLEC Coalition argued that paragraph 664's emphasis on pre-entry review by the FCC indicates a desire by the FCC not to "reach down to affect pricing in existing 271 approvals." The CLEC Coalition asserted that the FCC did not establish itself as the initial rate setting body in "a circumstance such as the one in Maine" but rather simply asserted its authority to review rates in the event of a disagreement between Verizon and the state commission. The CLEC Coalition urged us to exercise our authority to ensure that prices are conducive to competition and to provide reasonable transition for any rate changes. Finally, the CLEC Coalition endorsed the Examiner's recommendation that current TELRIC-based rates remain in place until we approve new 271 rates. The Coalition, however, urged us not to determine at this time that FCC-approved prices automatically be allowed to go into effect.

ALTS and Covad argued that the Supreme Court, in *Iowa II,* clearly held that while the FCC could establish the pricing methodology to be used for setting rates under section 252, it was the states that actually applied the methodology and set the rates. ALTS and Covad contended that we have an ongoing role in ensuring that the rates charged by Verizon under section 271 meet the appropriate standards. ALTS and Covad dispute the Examiner's "preemptive preemption" approach of finding preemption before finding an actual conflict with an FCC determination on the merits of an issue. They argued that the question is not whether a state pricing decision thwarts the policies of the *TRO* but, instead, whether it thwarts the requirements of section 251 and

[30]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, the question needed to be addressed.

271 of the TelAct. Finally, they argued that, contrary to Verizon's assertions, the FCC did not forbid the application of forward-looking pricing to section 271 UNES but rather only stated that TELRIC pricing was not required. Thus, a state commission could find that TELRIC pricing met the "just and reasonable" standard or that another forward-looking pricing methodology could be used.

USA Telephone also contended that we should exercise our authority to set prices for section 271 UNEs in order to protect the competitive environment in Maine and to meet the needs of Maine consumers. USA Telephone argued that we must be prepared to exercise our authority to encourage stability in the market. The current instability makes it very difficult for CLECs to secure the necessary capital to implement planned facility build-outs. While not suggesting a permanent status *quo*, USA Telephone did urge consideration of the competitive impacts during any transitions.

AT&T argued that the Examiner's recommendation that we refrain from exercising our pricing authority over section 271 UNEs was unwarranted because it was based upon the mistaken belief that the FCC had asserted exclusive jurisdiction in the *TRO.* AT&T pointed out that the Examiner's Report itself admitted that the FCC did not specifically preclude state commissions from evaluating compliance with the federal "just and reasonable" standard. AT&T urged us to preclude Verizon from raising its 271 UNE rates above TELRIC until it obtained specific approval for its new rates from the FCC.

D. Analysis

Determining the scope of the Commission's 271 pricing authority involves both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above, and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation. Thus, we find, for the reasons discussed below, that we have the authority to require Verizon to file prices for its section 271 UNEs in its wholesale tariff and that we may review those prices for compliance with the FCC's "just and reasonable" standard.[31]

There are a number of factors which generally support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has

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[31]It is also possible that we may order Verizon to unbundle certain elements pursuant to state law, in which case we will use state law pricing standards to evaluate Verizon's proposed rates.

considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. In addition, as both CLECs and the National Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[32] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[33]

Finally, state commissions have authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

In addition to all of the supporting factors, we find that Verizon's commitment to file a wholesale tariff included a commitment to file prices for the elements included in the tariff. Indeed, if we do not require Verizon to file prices, its commitment to file a wholesale tariff becomes a hollow promise, given the complexities of the wholesale marketplace at this time. In addition, practical concerns, such as timely access to section 271 UNEs, require that we enforce Verizon's commitment by requiring it to file proposed rates for each of the section 271 UNEs. We do not foreclose the possibility that Verizon may also seek approval of such rates from the FCC. If it does obtain such approval, it may file those same rates with us and we will give the FCC's determination substantial weight during our review.

Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach

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[32]*Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

[33]*Iowa II,* 525 U.S. at 384.

today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.[34]

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

1. Line Sharing

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[35] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[36] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.[37]

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[34] Order and Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, FCC 03-313, (rel. August 20, 2004)(Interim Rules Order).

[35] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

[36] *TRO at* ¶ 258.

[37] *USTA II at 45.*

Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.[38]

2. State authority to order unbundling

Recently, in the *Skowhegan OnLine* proceeding[39], we found that we have authority, pursuant to 35-A M.R.S.A. §§ 1306 and 7101, to order the unbundling of network elements not required by federal law when doing so meets a demonstrated need by CLECs and is consistent with both state and federal policies concerning broadband deployment. We predicated our decision in *Skowhegan Online* on an earlier decision in the *Mid-Maine Arbitration Case,*[40] in which we found that we had authority to order access to additional UNEs under section 252(d)(3) of the TelAct[41] and that 35-A M.R.S.A. § 1306[42] provided us with authority to designate additional UNEs so long as our actions did not conflict with federal law. We found in *Skowhegan Online* that section 1306 continued to provide us with independent authority under state law and that 35-A M.R.S.A. § 7101 provided additional authority to order unbundling where doing so will allow for further deployment of broadband, especially in rural areas. Thus, we found that unbundling pursuant to state law requires a showing that the lack of unbundling constitutes an unreasonable act or is insufficient when consideration is given to state law, public policy, and the potential impact of the unbundling on the availability of

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[38]Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs and we will not reach that issue in this Order.

[39]*Investigation of Skowhegan Online, Inc.'s Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004) and Order on Reconsideration (June 15, 2004).

[40]*Mid-Maine Telplus, Re: Request for Arbitration of an Interconnection Agreement with Bell Atlantic*, Order Addressing Subloop and Extended Link Issues (E3 and E7) – Part 2, Docket No. 98-593 (April 9, 1999) (*Mid-Maine*).

[41]Our holding was based upon the fact that there was nothing in the TelAct that provided the FCC with exclusive authority to designate UNEs. *Mid-Maine* at 3. Indeed, the FCC's *Local Competition Order* specifically provided that states had authority to order additional UNEs pursuant to state law and the FCC's Rules at that time specifically provided for state commission designation of additional UNEs during arbitration proceedings. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996). The *TRO* has since vacated both of those rules/findings.

[42]Section 1306 provides that, if the Commission determines that a term, condition, practice or act is unjust, unreasonable, insufficient, or unjustly discriminatory, the Commission may "establish or change terms, conditions, measurement, practice, service or acts, as it finds just and reasonable."

telecommunications services to Maine consumers. In addition, any decision to unbundle pursuant to state law must not conflict with federal law.

In our Order on Reconsideration in *Skowhegan Online*, we re-affirmed our earlier findings and pointed to other provisions of state law that supported our unbundling authority. Specifically, we found that the standards in 35-A M.R.S.A. § 301, requiring all utilities to provide "safe, reasonable and adequate facilities and service," as well as those set forth in 35-A M.R.S.A. § 711, granting us authority to order the joint use of wires and prescribe reasonable compensation and reasonable terms and conditions, supported unbundling. We emphasized section 7101's clear expression of the Legislature's policy objective of supporting broadband deployment throughout the state. Finally, we pointed out that the Law Court had already found that the Commission has all the implied and inherent powers necessary to implement the objective set forth in section 7101. *New England Telephone v. PUC,* 1997 ME 222. Thus, we found that the clear policy objectives contained in section 7101, when combined with our broad mandate to ensure that utility practices and rates are reasonable pursuant to section 1306, provided us with the necessary authority to require Verizon to unbundle its legacy copper network.

3. Federal Preemption

a. Definition of Preemption

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[43] If a federal statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[44] Similarly, savings clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[45] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[46] What constitutes a sufficient obstacle, however, is a matter of judgment, informed by examining the statute as a whole and identifying its purpose and intended effects.[47]

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[43] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[44] *Id.*

[45] *Id.*

[46] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[47] *Id.*

b. Language of the TelAct

Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserted that its interpretation of the requirements of section 251, i.e., its Rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[48] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted.

However, the FCC's assertion that its Rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in a decision concerning the FCC's *Local Competition Order,* which implemented the TelAct.[49] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[50] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[51] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[52] Indeed, the FCC admits in footnote 611 of the *TRO* that the Eighth Circuit's interpretation of section 251(d)(3) is the law of the land and that mere inconsistency with the FCC's rules is not enough to trigger federal preemption. Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

In analyzing the legislative intent behind a statutory requirement that two mandates be consistent, courts have defined the word by its common usage, as found in the dictionary. *See* e.g. *Cross v. Warden, N.H. State Prison*, 644 A.2d 542, 543 (N.H. 1994)(the meaning of "consistent" is synonymous with "consonant" or "compatible."); *Ryan v. Roach Drug Co.*, 239 P. 912, 914 (Okla.1925)

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[48]*TRO* at 191.

[49]*See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999)(*Iowa I*).

[50]*Id.* at 806.

[51]*Id.*

[52]*See TRO* at ¶ 192, fn. 611.

("'Consistent' means not contradictory, compliable, accordant."). Courts have also concluded that two designs may be consistent even if one contains additional elements. *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100, 104 (Wis.1997) ("so long as any issues addressed in both a master plan and an official map are not contradictory, the master plan is consistent with the official map").

The Supreme Court of Vermont addressed the meaning of section 251's "consistency" requirement in a challenge to an order of the Vermont Public Service Board requiring Verizon to make certain facilities or services available to CLECs pursuant to state law.[53] Verizon argued that the Board's order was inconsistent with federal law and not supported by independent state authority.[54] In holding that there was ample state authority to support the order and that the order did not contradict federal law, the Vermont court described how Congress intended the Act to work in conjunction with state regulatory commissions:

> The Telecommunications Act of 1996 fundamentally amends the Communications Act of 1934, the principal legislation that regulates telecommunications and established the FCC. . . . The use of a federal statute by a state board is consistent with the federal government's approach to telecommunications regulation, in which states are considered partners in regulation. In both the 1934 Act and the 1996 Act, Congress has taken pains to preserve the overlapping jurisdiction of the states and the federal government over the telecommunications industry. . . . Congress did not intend to occupy the field of telecommunications regulation, it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act.[55]

The court further explained that the "federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act . . . federal law sets only a floor, the requirements of which may be exceeded by state law."[56] Furthermore, the Vermont court emphasized that when

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[53]*In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

[54]*Id.* at 1198.

[55]*Id.* at 1201.

[56]*Id.* at 1204.

compliance with a state commission's order does not interfere with a carrier's ability to comply with federal law, there is no conflict between the state and federal regulations.[57]

B. Positions of the Parties

1. Verizon

Verizon argued that the FCC has determined that CLECs are not impaired without unbundled access to line sharing. According to Verizon, where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserted that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

Verizon contended that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon, especially where the FCC has explicitly declared that the UNE is not required. Verizon further argued that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argued that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputed the CLECs' claim that the Commission has separate state authority to order line sharing and stated that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refuted the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts.

In its Supplemental Brief, Verizon asserted that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[58] Verizon also repeated its belief that the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *TRO*." Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argued that even if the state is authorized to order unbundling (which they insist, it is not), it

[57] *Id.* at 1205.

[58] *USTA II* at 12.

may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

In its exceptions, Verizon objected to the Examiner's recommendation that we find that line sharing is a continuing 271 obligation under Checklist Item No. 4 but did not directly address state unbundling authority.

2. CLECs[59]

In their Brief, the Consolidated Intervenors pointed to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contended that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argued that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They also suggested that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cited 35-A M.R.S. A. § 7101 and argued that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas, and urged us to order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

In their Reply Brief, the Consolidated Intervenors again described how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cited paragraph 650 of the *TRO* which states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." and implored the Commission to enforce Verizon's 271 obligations and require continued line sharing.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirmed the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argued that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

As stated earlier, the Consolidated Intervenors filed separate exceptions. GWI argued that the Commission is not preempted from ordering line sharing and that, absent a court finding of preemption, the Commission should rely upon state law and policy to require unbundled line sharing. GWI argued that that no

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[59]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate."

court had supported the FCC's proposition that any unbundling not required by the FCC's rules promulgated under section 251 is preempted by the "requirements of this section" language. GWI also pointed to the FCC's own acknowledgement of the limitations of the preemptive effect of the TelAct.

GWI's exceptions also addressed both the state policy supporting broadband deployment and the impact on that policy if line sharing is eliminated. GWI pointed out that the price for line sharing will rise in October and that if GWI has to raise its rates to cover increased costs, rural areas will be the hardest hit. GWI also argued that the FCC's line sharing decision was based upon a vision of the competitive landscape that does not match what is occurring in Maine and which has changed since the issuance of the *TRO* itself. Specifically, *USTA II* overturned the FCC's findings regarding the unbundling of mass market switching, which will limit the development of residential voice competition and the revenues associated with it.

GWI argued that the consequences of the FCC's actions seriously impact the future of competition in Maine, particularly for broadband services. According to GWI, while cable broadband service is available in urban and suburban areas, it is generally not available in rural areas. While Verizon broadband is available in many Verizon exchanges, over 40% of the customers are impacted by distance limitations. GWI asserted that there are ways to overcome those problems but they require CLEC access to Verizon line sharing and Verizon's cooperation in deploying the solutions. Thus, GWI urged us to exercise our authority to order line sharing and to set a fair rate for line sharing because failure to do so will result in constant litigation over interconnection agreement terms.

The OPA's exceptions urged us to order Verizon to continue to provide unbundled line sharing at affordable rates. The OPA argued that the FCC's decision regarding line sharing transition rates should not be interpreted as an FCC decision as to a just and reasonable rate under section 271 and that we should exercise our authority to make a determination regarding pricing. Absent Commission action, Maine consumers will be harmed by substantial increases in prices for xDSL and the potential destruction of the nascent broadband market in Maine.

Cornerstone's exceptions also recommended that we exercise our authority to order the continued availability of line sharing at reasonable rates. Cornerstone alleged that if the FCC's transition rates are allowed to go into effect, Cornerstone would not be able to serve many of the rural exchanges it intends to serve because it could not cover the exchange-specific costs. Cornerstone pointed out that if it and other Maine CLECs cannot economically serve these rural areas, it is unlikely that larger firms would be willing to invest in areas where the margins are so slim. For some of these exchanges, where neither Verizon nor the cable provider have deployed xDSL, this means that citizens and businesses in these areas will continue to lag behind more urban areas.

ALTS and Covad urged us to exercise our own authority to order line sharing under state law. They argued that sections 251 and 252 of the TelAct preserve the authority of state commissions to order unbundling and that the Supreme Court has refused to diminish the role of state commissions in overseeing local competition matters. Further, and contrary to the assertions of the FCC, the FCC cannot preempt state commissions by its orders or rules – the language of the TelAct preserving state authority controls. ALTS and Covad also pointed out that in the *TRO* the FCC did not preempt any existing state law unbundling requirements nor any future state law unbundling requirements – it acknowledged that such unbundling requirements may be consistent with the federal framework.

ALTS and Covad argued that facts supporting the FCC's decision not to unbundle line sharing on a national basis do not exist in Maine. Specifically, the FCC relied upon a carrier's ability to line-split with other carriers. However, in Maine, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles, thereby limiting CLECs' ability to line split. In addition, there are customer-impacting time constraints on line splitting, and different policies for submission of orders, and Verizon will not line split on resold voice service. Thus, ALTS and Covad urged the Commission to order the continued availability of line sharing at TELRIC rates.

AT&T supported the Hearing Examiner's determination that line sharing should be provided under section 271 but disagreed with the recommendation that we not exercise our authority to set prices for section 271 UNEs. Specifically, AT&T contended that the FCC had not asserted exclusive jurisdiction over section 271 pricing and that we need not refrain from exercising our section 271 authority in deference to a claim of exclusive jurisdiction that the FCC did not make.

C. Decision

We find that the FCC has not preempted our further consideration of whether to unbundle line sharing under state law. First, we agree with GWI that the Hearing Examiner essentially recommended preemptive preemption, i.e. that we not take action on the grounds that the FCC might attempt to preempt our action. We reject this approach because, as several parties pointed out, the FCC specifically declined to make a finding of preemption of both existing and future state unbundling decisions. While the FCC made clear that it might find preemption if the state decision met federal preemption standards, such a determination would need to be made based upon the specific circumstances of each case. The D.C. Circuit reached the same conclusion in *USTA II*, i.e., that claims relating to preemption were not ripe because no specific state decision had been challenged.

While we recognize the federal policies enunciated by the FCC in the *TRO*, we find that further exploration of the specific circumstances in Maine and state law policies and mandates are necessary in order to determine whether we should, in fact, exercise our authority under 35-A M.R. S.A. §§ 301, 711, 1306 and 7101 to order

line sharing. As we stated in our *Skowhegan Online* decision, we take very seriously the Legislature's directive that all Maine citizens should have access to broadband services. The issues raised by GWI, Cornerstone, and the OPA concerning the viability of rural broadband deployment warrant a closer examination. It would be premature to find at this time, both on a factual and legal basis, that we have already been preempted by the FCC. In addition, there are several pending legal challenges at the FCC and in the courts which may provide further direction concerning the scope of any federal preemption relating to line sharing. Waiting for resolution of those proceedings, however, would mean delaying for an uncertain period a decision that might prevent a significant declaration in rural broadband deployment. Given our obligation to implement legislative directives. We think the more appropriate course is to proceed as expeditiously as possible to resolve the question of whether to order the unbundling of line sharing under state law.

If we decide to order line sharing pursuant to state law, we would also set the price for such sharing using state law standards, i.e., just and reasonable rates. We invite the parties to develop a record in this proceeding that would allow us to set rates at the conclusion of the proceeding.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs and prices for those UNEs in its state wholesale tariff. We also determine that we have authority under state law to order the unbundling of line sharing and that we should proceed to investigate whether to exercise that authority.

Dated at Augusta, Maine, this 3rd day of September, 2004.

BY ORDER OF THE COMMISSION

____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.